

FEB - 3 2016

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIAUNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:) Case No. 14-21394-B-13
)
 PATRICK DAVID CLARK and SUZANNE) DC Nos. PP-7
) ASH-3
 JANETTE CLARK,) ASH-4
)
)
 Debtor(s).)

AMENDED

CONSOLIDATED MEMORANDUM DECISION:

(I) GRANTING MOTION TO CONVERT AND CONVERTING THIS CASE TO A CHAPTER 7 CASE [DKT. 244]; (II) DENYING MOTION TO ALTER OR AMEND ORDER DENYING MOTION TO QUASH [DKT. 232]; (III) DENYING APPLICATION FOR RULE 2004 EXAMINATION AND QUASHING RELATED SUBPOENAS [DKTS. 228, 237]; and (IV) DISCHARGING ORDER TO SHOW CAUSE WITH NO FURTHER SANCTIONS [DKT. 237]

INTRODUCTION

There are four matters presently before the court: (1) an application for a Rule 2004 examination filed by debtors Suzanne Clark and Patrick Clark on December 9, 2015 [dkt. 228];¹ (2) the debtors' motion to alter or amend an order denying the debtors' earlier motion to quash filed on December 14, 2015 [dkt. 232]; (3) an order for debtors' former litigation and current bankruptcy counsel - Arthur Samuel Humphrey - to show cause why he should not be sanctioned, which order was entered by the court sua sponte on December 15, 2015 [dkt. 237]; and (4) a motion to convert this chapter 13 case to a chapter 7 case filed by S&J Advertising, Inc., on December 23, 2015 [dkt. 244].² Facts

¹To avoid confusion, "debtors" will refer to Patrick and Suzanne Clark and "co-debtor" will refer to Suzanne Clark.

²The debtors are now represented in this chapter 13 case by their litigation attorney, Mr. Humphrey. Mr. Humphrey was

1 relevant to each matter are discussed within the section to which
2 each motion relates. All four matters were heard and argued on
3 January 20, 2016. Appearances were noted on the record. For the
4 reasons explained below, the motion to convert will be granted
5 and all other motions will be denied.

6 7 **JURISDICTION AND VENUE**

8 Federal subject-matter jurisdiction is founded on 28 U.S.C.
9 § 1334. Each of the matters addressed in this memorandum
10 decision are core proceedings that a bankruptcy judge may hear
11 and determine. 28 U.S.C. §§ 157(b)(2)(A) and (0). To the extent
12 they may ever be determined to be matters that a bankruptcy judge
13 may not hear and determine without consent, the parties
14 nevertheless consent to such determination by a bankruptcy judge.
15 28 U.S.C. § 157(c)(2). Venue is proper under 28 U.S.C. § 1409.

16 17 **I. ORDER GRANTING MOTION TO CONVERT AND CONVERTING THIS CASE TO 18 A CHAPTER 7 CASE [DKT. 244]**

19 **Introduction**

20 Presently before the court is a motion filed by S&J
21 Advertising, Inc., to convert this chapter 13 case to a chapter 7
22 case. The debtors have opposed the motion and the corporation
23 has replied to the debtors' opposition. The court has reviewed
24 the motion, the opposition, the reply, and all related exhibits
25 and declarations.

26 _____
27 substituted for the debtors' former bankruptcy counsel on
28 December 21, 2015. References to the debtors' litigation
attorney are references to Mr. Humphrey.

1 The court held a hearing on the motion to convert on January
2 20, 2016. At that time the court heard and considered arguments
3 and statements in support of and opposition to the motion. For
4 the reasons explained below, the court concludes there is cause
5 under 11 U.S.C. § 1307(c).³ The court also concludes that
6 because there are non-exempt assets available to pay creditors,
7 conversion, rather than dismissal, is in the best interest of the
8 creditors and the estate. See Nelson v. Meyer (In re Nelson),
9 343 B.R. 671, 675 (9th Cir. BAP 2006). Therefore, the motion to
10 convert will be granted and this chapter 13 case converted to a
11 case under chapter 7 of the Bankruptcy Code.

12 13 **Background and Statement of Facts**

14 On October 16, 2015, the corporation filed an application to
15 examine the debtors under Federal Rule of Bankruptcy Procedure
16 2004. The court authorized those examinations in orders entered
17 on October 20, 2015. Subpoenas compelling the debtors to produce
18 documents by December 2, 2015, and appear for Rule 2004
19 examinations at the office of the corporation's attorney at 2:00
20 p.m. on December 4, 2015, issued on October 21, 2015.

21 The debtors moved to quash the corporation's Rule 2004
22 subpoenas on November 3, 2015. The corporation opposed that

23
24 ³Conversion is governed by § 1307(c) which states:
25 [O]n request of a party in interest, ... and after
26 notice and a hearing, the court may convert a case
27 under this chapter to a case under chapter 7 of this
28 title, or may dismiss a case under this chapter,
whichever is in the best interests of creditors and the
estate, for cause[.]
11 U.S.C. § 1307(c).

1 motion on November 18, 2015, and the debtors replied to that
2 opposition on November 24, 2015. The court held a hearing on the
3 debtors' motion to quash on December 2, 2015, and, at that time,
4 denied the motion. The court also ordered the debtors to produce
5 the subpoenaed documents and appear for Rule 2004 examinations at
6 the offices of the corporation's attorney at 2:00 p.m. on
7 December 4, 2015. The court placed its ruling on the record as
8 follows:

9 I'm denying the motion to quash. The debtors are
10 ordered to appear as noticed in the subpoena on Friday,
11 December 4th, at 2:00 p.m., and they are directed to
12 produce the documents subject to cooperation between
13 counsel. If there's a dispute as to the document
14 production, I'll hear it on very short notice.

15 The court memorialized its oral ruling in civil minutes
16 filed on December 2, 2015, and a civil minute order entered on
17 December 8, 2015.

18 Discussions after the hearing resulted in an agreement
19 between the debtors' litigation attorney and the corporation's
20 attorney to continue the court-ordered document production and
21 Rule 2004 examination date. At the request of and as an
22 accommodation to the debtors, the date for document production
23 was extended to December 17, 2015, and the court-ordered Rule
24 2004 examinations were continued to December 21, 2015.

25 Despite these extensions, on December 14, 2015, the debtors'
26 litigation attorney sent the corporation's attorney an email
27 stating that the debtors would not produce documents by December
28 17, 2015, and they would not appear for Rule 2004 examinations on
December 21, 2015, as ordered. Consistent with that email,
subpoenaed documents were not produced by December 17, 2015, and

1 the debtors failed to appear for their Rule 2004 examinations on
2 December 21, 2015.

3 Debtors informed the corporation's attorney they could
4 ignore the court's December 2, 2015, order to produce documents
5 and appear for Rule 2004 examinations because the order was
6 subject to clarification in the event of a dispute, and on
7 December 14, 2015, they moved to alter or amend that order which
8 meant they were free to disobey the court's order until the
9 motion to alter or amend was decided. Regarding the latter, the
10 debtors relied on (and referred the corporation's attorney to)
11 two cases to support their position: Creative Data Forms, Inc. v.
12 Pa. Minority Bus. Dev. Auth. (In re Creative Data Forms, Inc.),
13 72 B.R. 619 (Bankr. E.D. Pa. 1985), and In re Reading
14 Broadcasting, Inc., 386 B.R. 562 (Bankr. E.D. Pa. 1982).

15 The debtors' decision to disobey this court's order of
16 December 8, 2015, is part of a larger and continuing pattern of
17 an abuse of the chapter 13 process in which the debtors have
18 engaged from the inception of this case. And that abuse relates
19 primarily to the manipulation and knowing undervaluation of the
20 co-debtor's 50% interest in the corporation which is to be sold
21 and the proceeds used to pay creditors. The debtors manipulated
22 and knowingly undervalued that interest in order to confirm plans
23 with substantially reduced payments to unsecured creditors and,
24 in turn, enhance the retention of non-exempt assets for their own
25 personal benefit.

26 The debtors filed a chapter 13 petition on February 14,
27 2014, and with that petition filed schedules - under penalty of
28 perjury - in which they valued the co-debtor's 50% interest in

1 the corporation at \$42,250. The debtors also filed a plan with
2 the petition and schedules. That plan provided for payment of
3 approximately 50% to unsecured creditors.

4 Approximately one month after the petition, schedules and
5 initial plan were filed, on or about March 3, 2014, the
6 corporation provided the debtors with an appraisal which stated
7 that 100% of the equity in the corporation was valued at
8 \$811,000. The debtors made no effort to amend their schedules to
9 reflect the substantial difference in the valuation of the co-
10 debtor's 50% interest in the corporation between the schedules
11 filed with the petition and the appraisal. In fact, there is no
12 indication that the debtors made any disclosure of this valuation
13 or the appraisal to the court, the trustee, or creditors.
14 Instead, based on the representation in the schedules that the
15 co-debtor's 50% interest in the corporation was worth only
16 \$42,250, on May 12, 2014, the debtors obtained confirmation of
17 the initial plan which provided for payment of 50% of unsecured
18 claims.

19 Two days after the plan was confirmed, on May 14, 2014, the
20 debtors filed a first modified plan and motion to confirm it.
21 The proposed payments to unsecured creditors in this first
22 modified plan were again based on the value of the debtors' non-
23 exempt assets which the debtors stated was \$58,036 and which
24 included the co-debtor's 50% interest in the corporation valued
25 at \$42,250. Again, although in March 2014 the debtors received
26 an appraisal which valued 100% of the corporate interest at
27 \$811,000, the schedules were not amended and there was no
28 disclosure that the co-debtor's 50% interest may be worth more

1 than \$42,250. And yet, this time, the debtors proposed a plan
2 that *reduced* payments to unsecured creditors to 10%.
3 Confirmation of this plan was denied on July 8, 2014. Three
4 weeks later, on July 30, 2014, the debtors received an offer from
5 the corporation to purchase the co-debtor's 50% interest for
6 \$200,000, plus additional payments over time.

7 Despite (1) the March appraisal which valued 100% of the
8 shares of the corporation at \$811,000 (and thus the co-debtor's
9 50% interest at \$405,500) and (2) the corporation's July 2014
10 offer to purchase the co-debtor's 50% interest in the corporation
11 for \$200,000, on September 2, 2014, the debtors filed amended
12 Schedules B and C in which they again valued the co-debtor's 50%
13 interest in the corporation at \$42,250. Based on the valuation
14 of non-exempt assets that included a valuation of the co-debtors'
15 50% interest at \$42,250, and despite knowing that the interest
16 could be worth between \$200,000 and \$400,000, on September 2,
17 2014, the debtors also filed a second modified plan in which they
18 proposed to reduce payments to unsecured creditors from 50% to
19 10%. Even more troubling, just six days later, on September 8,
20 2014, the debtors received a third-party offer to purchase 100%
21 of the corporate shares for a staggering \$1,200,000. None of
22 these values or offers were disclosed and, yet, knowing that the
23 co-debtor's 50% interest in the corporation could be worth
24 upwards of \$600,000, the debtors allowed the court to confirm
25 their 10% repayment plan on October 16, 2014.

26 It was not until March 10, 2015, and then only after the
27 corporation informed the court that the co-debtor's 50% interest
28 in the corporation was likely to be valued at over \$200,000 in a

1 joint appraisal prepared by the debtors' appraiser and one
2 selected by the corporation in a pending state court proceeding
3 under California Corporations Code § 2000, that the debtors filed
4 the third modified plan and motion to confirm it. The third
5 modified plan was proposed as a 100% repayment plan based on the
6 anticipated valuation of the co-debtor's 50% corporate interest
7 in the California Corporations Code § 2000 proceeding. The third
8 modified plan was confirmed in an order entered on May 18, 2015.⁴

9 After the third modified plan was confirmed, on or about
10 June 6, 2015, an appraiser selected by the debtors and another
11 selected by the corporation prepared a joint appraisal in which
12 they valued the co-debtor's 50% corporate interest at \$247,000.
13 Nearly a year and a half after the petition was filed, after
14 numerous sworn statements that the co-debtor's 50% interest was
15 worth only \$42,250 knowing it was likely worth more, and two
16 confirmed plans with substantially reduced payments to unsecured
17 creditors based on a knowing undervaluation, the debtors now
18 claim the \$247,000 value is too low.⁵

19
20
21 ⁴This third modified plan was filed and confirmed based on
22 the representation it was a 100% repayment plan, but on July 8,
2015, the debtors' former bankruptcy counsel informed the court
the plan was in fact not a 100% plan.

23 ⁵It appears the debtors now claim the \$247,000 valuation is
24 too low because they are obligated to pay litigation attorney's
25 fees from any surplus distribution from the sale of that
26 interest. This is somewhat disconcerting in two respects.
27 First, the disclosure that the debtors' litigation attorney is to
28 be paid from surplus proceeds from the sale of the co-debtor's
50% interest in the corporation was made in § 329(a) disclosures
submitted over a year after the petition was filed and only after
the court required these disclosures before confirming the third
modified plan. Again, this is another instance in which the

1 **Discussion**

2 **Material Default by the Debtors With Respect to the Term of a**
3 **Confirmed Plan**

4 Cause is defined in § 1307(c) to include a "material default
5 by the debtor with respect to a term of a confirmed plan." 11
6 U.S.C. § 1307(c)(6). The debtors' obligation to appear in court
7 when ordered by the court to do so is a material term of the
8 debtors' confirmed third modified plan inasmuch as the order
9 confirming that plan states: "The debtor shall appear in court
10 whenever notified by the court to do so." This court's order of
11 December 2, 2015, ordering the debtors to appear for Rule 2004
12 examinations is an order for the debtors to appear in court.

13 The current version of Rule 2004 is derived from Section
14 21(a) of the Bankruptcy Act of 1898 and former Federal Rule of
15 Bankruptcy Procedure 205. See Lawrence P. King et al., Collier
16 on Bankruptcy, Part 3(a) at 3-23 (15th ed. 1996); William T.
17 Laube and Asa S. Herzog, Bankruptcy Act And Rules, p.a-438
18 (Matthew Bender 1973). In relevant part, § 21(a) of the
19 Bankruptcy Act of 1898 states that "[a] court of bankruptcy may,
20 ..., by order require any designated person, including the
21 bankrupt and his wife, *to appear in court or before a referee*
22 ..., to be examined concerning the acts, conduct, or property of
23 a bankrupt whose estate is in process of administration under

24 _____
25 debtors were less than forthcoming with timely, accurate, and
26 truthful information. Second, this gives the debtors' litigation
27 attorney a personal and financial stake in this bankruptcy case
28 which may conflict with the best interest of the creditors and
the estate. In other words, the debtors' litigation attorney
finds himself in a position where he may have been tempted to
place his desire to be paid over interests of paying creditors.

1 this Act[.]” (Emphasis added). As amended in 1938, § 21(a) of
2 the 1898 Bankruptcy Act states in relevant part: “The court may,
3 upon application ..., by order require any designated persons,
4 including the bankrupt ... to *appear before the court...* to be
5 examined concerning the acts, conduct, or property of a
6 bankrupt.” (Emphasis added).

7 Former Federal Rule of Bankruptcy Procedure 205, which took
8 effect on October 1, 1973, did not specifically require
9 examinations to be conducted in the courtroom. As the court in
10 In re Symington, 209 B.R. 678 (Bankr. D. Md. 1993), explained:

11 On October 1, 1973, when the Federal Rules of
12 Bankruptcy Procedure went into effect, Bankruptcy Rule
13 205 did not specifically require that bankruptcy
14 examinations be conducted in open court. See 12
15 Collier on Bankruptcy ¶ 205.11 (14th ed. 1978). The
16 practice since 1973 has been to hold bankruptcy
17 examinations outside of the presence of the court, in
18 the same manner as pretrial discovery is conducted
19 under the Federal Rules of Civil Procedure.

20 Id. at 693.

21 Rule 205 did not and, under the Rules Enabling Act at 28
22 U.S.C § 2075, could not change substantive provisions of the
23 Bankruptcy Act. In other words, the Rules of Bankruptcy
24 Procedure were adopted to govern the procedural aspects of
25 substantive statutory provisions but did not change the
26 substantive law as it existed. See In re Tallerico, 523 B.R.
27 774, 783-84 (Bankr. E.D. Cal. 2015) (explaining that 1973 rules
28 were limited to procedural matters in compliance with the Rules
Enabling Act).

Given the silence in Rule 205 as to where an examination was
to take place, it follows that the location of the examination
was viewed as a procedural matter removed from statute within the

1 boundaries of the Rules Enabling Act. Id. (explaining that rule
2 drafters were careful to recognize procedural/substantive
3 boundaries). The substantive provision of the Bankruptcy Act
4 that characterized an examination of the debtor as a proceeding
5 before the bankruptcy court was unaffected by Rule 205 and,
6 subsequently, by Rule 2004. Thus, although permissible to
7 conduct a Rule 2004 examination outside the confines of a
8 courtroom, the examination itself substantively remains a
9 proceeding in or before the bankruptcy court now just as it was
10 under the 1898 Bankruptcy Act. See In re Samuelsohn, 174 F. 911,
11 912 (W.D.N.Y. 1909) (describing examination testimony given by
12 debtor during course of bankruptcy case as part of the record in
13 the bankruptcy proceeding). That means when the debtors
14 disobeyed this court's order of December 2, 2015, and failed to
15 appear for Rule 2004 examinations, they failed to appear in court
16 when they were ordered to do so and as they were required to do
17 by a material term of the confirmed third modified plan. That
18 constitutes a default.

19 In short, the debtors' decision to disobey this court's
20 order to appear for Rule 2004 examinations is a material default
21 by the debtors with respect to a term of the confirmed third
22 modified plan. That, in turn, is cause under § 1307(c)(6).
23 And the reasons given by the debtors in an effort to support
24 their decision to disobey the court's December 2, 2015, order are
25 not persuasive or credible. And they do not negate the existence
26 of cause.

27 The court's order for the debtors to appear for Rule 2004
28 examinations was clear, specific, and direct. Whereas the order

1 to produce documents was subject to intervention by the court, on
2 very short notice, in the event of a dispute regarding
3 production, the order to appear for examinations was not. The
4 latter was direct and unconditional.

5 Even assuming the debtors understood that both aspects of
6 the court's order, i.e., document production and Rule 2004
7 appearances, were subject to further court intervention in the
8 event of a dispute, the debtors failed to seek that intervention
9 before the continued examination date. Instead, they waited
10 twelve days to file a motion to alter or amend the court's
11 December 2, 2015, order and filed that motion seven days before
12 the continued examination date. Instead of asking the court to
13 hear that motion on shortened notice, see LR 9014-1(f)(3), the
14 debtors set the motion for hearing under Local Rule 9014-1(f)(1)
15 which requires at least 28 days' notice resulting in a hearing
16 date of January 20, 2016 - nearly a month after the date on which
17 they were to appear for Rule 2004 examinations.

18 The court is persuaded that the debtors' decision to set a
19 hearing on the motion to alter or amend was a tactical decision
20 made for the purposes of delay. This is apparent from the
21 position the debtors and their litigation attorney took from the
22 day the motion to alter or amend was filed on December 14, 2015,
23 through the date of their non-appearance on December 21, 2015;
24 namely, that the pending motion to alter or amend gave them
25 license to disobey the court's order to appear for their Rule
26 2004 examinations until that motion was decided. The debtors'
27 argument is completely lacking in merit.

28 The debtors cited two cases to support the position that

1 they could freely disobey this court's order until the motion to
2 alter or amend was decided: Creative Data Forms, 72 B.R. 619,
3 and Reading Broadcasting, 386 B.R. 562. Not only are those cases
4 not binding on this court, but they are not even persuasive
5 authority. Neither case stands for the proposition - even
6 remotely - that a party may willfully disobey a court order so
7 long as a motion to alter or amend is filed and pending before
8 compliance is required. Rather, both cases stand for the
9 unremarkable proposition that a motion to alter or amend prevents
10 an order from becoming final for purposes of filing an appeal and
11 the time to file a notice of appeal. That is also stated in Rule
12 8002(b)(1). But that does not mean a party is free to disregard
13 an order.

14 Several courts have held that a pending motion to alter or
15 amend an order does not permit a party to disobey the order
16 subject to the motion. See In re Petro, 18 B.R. 566, 568-69
17 (Bankr. E.D. Pa. 1982) (stating that debtors are free to petition
18 the court to modify an order they disagreed with but pending
19 motion did not excuse compliance with order absent a stay even if
20 order was erroneous, improper, or unconstitutional); Azpitarte v.
21 King County, 2009 WL 939124 At *1 (W.D. Wa. 2009) ("[A] pending
22 motion [to amend] does not authorize a party to disobey an
23 explicit Court order[.]"). Moreover, such a rule could not be
24 reconciled with well-established Supreme Court and Ninth Circuit
25 authority.

26 The U.S. Supreme Court has made it abundantly clear that a
27 party is not free to disobey a federal court order even if it
28 dislikes, disputes, or disagrees with the order. In Maness v.

1 Meyers, 419 U.S. 449 (1975), the Supreme Court stated: "If a
2 person to whom a court directs an order believes that order is
3 incorrect, the remedy is to appeal, but, absent a stay, he must
4 comply promptly with the order pending appeal." Id. at 458. The
5 Ninth Circuit has also made abundantly clear that there are no
6 circumstances - not even exceptional circumstances - that warrant
7 disobedience with a federal court order even if the party or its
8 attorney disagrees with or dislikes the order and even if the
9 order is erroneous or improper. In Crystal Palace Gambling Hall,
10 Inc. v. Mark Twain Indus. (In re Crystal Palace Gambling Hall,
11 Inc.), 817 F.2d 1361 (9th Cir. 1986), the Ninth Circuit stated:

12 If the appellants believed that the district court
13 incorrectly issued an order, their remedy was to appeal
14 and request a stay pending the appeal. Maness v.
15 Meyers, 419 U.S. 449, 458, 95 S.Ct. 584, 590, 42 L. Ed.
16 2d 574 (1975); see also Chapman v. Pacific Telephone
17 and Telegraph Co., 613 F.2d 193, 197 (9th Cir. 1979).
18 Absent a stay, all orders and judgments of courts must
19 be complied with promptly. Mazzola, 716 F.2d at 1240
20 (quoting Maness v. Meyers, 419 U.S. 449, 458, 95 S. Ct.
21 584, 590, 42 L. Ed. 2d 574 (1975)). Although both
22 Crystal Palace and the shareholders appealed, no stay
23 was obtained. A party cannot disobey a court order and
24 later argue that there were 'exceptional circumstances'
25 for doing so. This proposed 'good faith' exception to
26 the requirement of obedience to a court order has no
27 basis in law, and we reject the invitation to create
28 such an exception. The appellants were not justified
by exceptional circumstances in disobeying the court's
order.

22 Id. at 1365.

23 In light of this otherwise clear, unambiguous, and binding
24 authority, the court gives no weight or credence to the debtors'
25 efforts to excuse or justify their disobedience with the December
26 2, 2015, order to appear for Rule 2004 examinations or the
27 ensuing material default under the confirmed third modified plan.
28 If the debtors or their litigation attorney disliked, disputed,

1 or disagreed with the order to appear, they could have appealed
2 (or sought leave to appeal) that order and sought a stay pending
3 the appeal. They also could have sought relief from that order
4 before the date they were required to comply with the order.
5 They did neither. Instead, they elected to deliberately disobey
6 the order and failed to appear for Rule 2004 examinations. And
7 in so doing, the debtors placed themselves in default of a
8 material term of the confirmed third modified plan. That is
9 cause under § 1307(c)(6).

10
11 Additional Cause Based on the Totality of the Circumstances

12 In addition to the non-exclusive statutory list under
13 § 1307(c), the administration of a chapter 13 case in a manner
14 that constitutes an abuse of the bankruptcy or chapter 13 process
15 is cause for conversion. In re Leavitt, 171 F.3d 1219, 1224 (9th
16 Cir. 1999) (citation omitted). The following factors are
17 considered in making this determination: (1) whether the debtor
18 misrepresented facts in the petition or plan, or unfairly
19 manipulated the Bankruptcy Code; (2) the debtor's history of
20 filings and dismissals; (3) whether the debtor intended to defeat
21 state court litigation; and (4) whether egregious behavior is
22 present. A bankruptcy court is not required to find that each
23 factor is satisfied or even weigh each factor equally. Khan v.
24 Curry (In re Khan), 523 B.R. 175, 185 (9th Cir. BAP 2014)
25 (citation omitted). Rather, these factors are tools in
26 considering the totality of the circumstances. Id.

27 Two of the four factors are not applicable in this case,
28 i.e., the debtors' history of filings and dismissals and whether

1 the debtors only intended to defeat state court litigation.
2 However, the exclusion of those factors does not end the court's
3 analysis. See Meyer v. Lepe (In re Lepe), 470 B.R. 851, 863 (9th
4 Cir. BAP 2012). Therefore, the court considers whether the
5 debtors misrepresented facts in the context of any plan or filed
6 any plan in any inequitable manner and whether egregious behavior
7 is present. Weighing these factors, the court finds both weigh
8 heavily in favor of a finding of additional cause.

9 From the inception of this case, the debtors have been less
10 than truthful. Knowing that the co-debtor's 50% interest in the
11 corporation was worth between \$200,000 and \$600,000, the debtors
12 filed schedules and amended schedules in which they stated under
13 oath the interest was worth only \$42,250. The debtors then
14 manipulated and abused the confirmation process by using the
15 intentionally understated value to confirm plans that provided
16 for artificially reduced payments to creditors and increased
17 their share of non-exempt assets.

18 Had the debtors accurately valued the co-debtor's 50%
19 corporate interest consistent with information within their
20 possession, the terms of any plan would have required payments to
21 unsecured creditors well in excess of ten and fifty percent. In
22 that regard, the debtors deceived not only their creditors and
23 the trustee, but, the court as well.

24 When truthful and accurate information is the exception and
25 not the rule, and when the confirmation process is repeatedly
26 manipulated as was done in this case, the chapter 13 process is
27 abused. Therefore, based on the debtors' conduct in this case as
28 it pertains to the intentional undervaluation of the co-debtor's

1 50% interest in the corporation for purposes of manipulating the
2 chapter 13 process in general - and the plan confirmation process
3 in particular - the court concludes there is additional cause
4 under § 1307(c) based on what the court finds is a strong
5 satisfaction of at least two of the Leavitt factors.

6
7 Debtors' Remaining Objections are Overruled

8 In making its determination, the court has considered and
9 overrules the debtors remaining objections to conversion.

10 To the extent the debtors contend conversion is unfair to
11 their interests, the relevant consideration under § 1307(c) is
12 what is in the best interest of the creditors and the estate, not
13 the debtors. This objection is overruled.

14 The objection that conversion is a breach by the corporation
15 and its other director of fiduciary duties owed the co-debtor as
16 a minority shareholder is overruled. The debtor is not a
17 minority shareholder. Moreover, the corporation's actions in
18 seeking conversion as a party in interest are also post-petition
19 actions authorized under and expressly sanctioned by the
20 Bankruptcy Code and within the jurisdiction of this court.

21 The objection that the debtors are unable to respond due to
22 the unavailability of evidence necessary to oppose the motion to
23 convert is overruled because, in reaching its decision, the court
24 has not relied (and need not rely) on the facts for which the
25 debtors contend evidence is necessary, i.e., (1) that the debtors
26 have appealed from interlocutory orders without the necessary
27 motion for leave, (2) that the debtors have conducted meritless
28 post-petition litigation, and (3) that the debtors and litigation

1 attorney violated court orders barring discovery related to
2 transfer and valuation of the co-debtor's corporate interest.
3 The debtors also fail to articulate what the purported additional
4 evidence is.

5 The objection that the motion to convert is an improper
6 revocation of the order confirming the third modified plan is
7 overruled. Revocation of a confirmation order under 11 U.S.C.
8 § 1330 and conversion under § 1307(c) are different events.
9 Whereas § 1330 permits the court to revoke a confirmation order,
10 § 1307(c) permits the court to dismiss or convert a case if a
11 confirmation order is revoked.

12 Debtors' res judicata argument is overruled. In making its
13 determination to convert, the court is required to consider the
14 totality of the circumstances as explained above. The debtors'
15 default under the third modified plan is also a post-confirmation
16 event.

17 The objection that the corporation lacks standing under Rule
18 2004 is overruled. Federal Rule of Bankruptcy Procedure 2004
19 states that "[o]n motion of any party in interest, the court may
20 order the examination of any entity." Fed. R. Bankr. P. 2004(a).
21 Standing under Rule 2004 only requires "party in interest"
22 status. The court has already ruled that the corporation is a
23 "party in interest" in this chapter 13 case. On January 27,
24 2015, the corporation moved for relief from the automatic stay in
25 order to continue with California Corporations Code § 2000
26 proceeding pending before the state court. The debtors opposed
27 that motion on the basis that the corporation lacked standing
28 because it was not a "party in interest." The court overruled

1 that objection, found and stated on the record that the
2 corporation is a "party in interest," and granted the
3 corporation's motion to allow the state court to proceed with
4 valuation of the co-debtor's 50% corporate interest. The debtors
5 did not appeal that order and the time to do so is long passed.⁶

6 Finally, the objection to the absence of an order that
7 requires the corporation, its principal, and its attorney to show
8 cause why they should not be sanctioned is overruled. As a
9 matter of treating the parties equitably, the debtors suggest
10 that if their litigation attorney is subject to sanctions for the
11 reasons stated in the order to show cause discussed below, then
12 so too are the corporation, its principal, and its attorney. As
13 is also explained below, the court's order to show cause directed
14 to the debtors' litigation attorney will be discharged and no
15 further sanctions ordered. Treating the parties equitably, the
16 court overrules this objection as it pertains to the corporation,
17 its principal, and its attorney and denies the debtors' request
18 to the extent the objection could be construed as such.

24 ⁶The court also notes that the corporation has a financial
25 interest at stake in this case. It is identified as the party
26 who will fund the plan by purchasing the co-debtor's 50%
27 corporate interest and it is potentially liable for substantial
28 attorney's fees if it does not. The debtors' opposition to the
motion to convert also identifies the corporation as a
"creditor." See In re Gucci, Inc., 126 F.3d 380, 388 (2nd Cir.
1997); see also In re PRTC, 177 F.3d 774, 777 (9th Cir. 1999).

1 Conversion Over Dismissal

2 Having found that there is cause to convert or dismiss under
3 § 1307(c), the court concludes that conversion rather than
4 dismissal is in the best interest of the creditors and the
5 estate. Given that the co-debtor's 50% corporate interest has
6 been jointly valued by an appraiser selected by the debtors and
7 another selected by the corporation, and given that the debtors
8 have repeatedly and knowingly manipulated and undervalued that
9 interest, in the course of performing his/her statutory duties, a
10 chapter 7 trustee will be able to determine if that valuation is
11 appropriate or if the estate should incur the administrative
12 expense associated with further litigation over the joint
13 valuation. In any case, there are significant non-exempt assets
14 valued at well over \$42,250 from which creditors may be paid.

15
16 Conclusion

17 In sum, cause exists under § 1307(c), and specifically under
18 § 1307(c)(6). And based on the significant non-exempt assets
19 available to pay creditors, conversion rather than dismissal is
20 in the best interest of the creditors and the estate. Therefore,
21 the motion to convert is GRANTED and this case is ordered
22 converted to a case under chapter 7 of the Bankruptcy Code.

23 A separate order will issue.
24
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1 **II. ORDER DENYING MOTION TO ALTER OR AMEND ORDER DENYING MOTION**
2 **TO QUASH [Dkt. 232]**

3 **Introduction**

4 This is a motion by the debtors to alter or amend the order
5 placed on the record on December 2, 2015, as memorialized in
6 civil minutes entered December 4, 2015, and a civil minute order
7 entered on December 8, 2015. The December 8, 2015, order denied
8 the debtors' motion to quash subpoenas served on the debtors
9 compelling document production and attendance at Rule 2004
10 examinations.

11 The court heard this motion on January 20, 2016.
12 Appearances were noted on the record. The court denied this
13 motion for reasons stated on the record. This order supplements
14 the court's oral ruling stated on the record in open court on
15 January 20, 2016.

16
17 **Discussion**

18 The debtors' motion to alter or amend was filed within
19 fourteen days and under Federal Rules of Civil Procedure 52(b)
20 and 59(e) as made applicable by, respectively, Federal Rules of
21 Bankruptcy Procedure 7052 and 9023. In a recent opinion,
22 Tattersalls, Ltd. v. DeHaven, 745 3 F.3d 1294 (9th Cir. 2014),
23 the Ninth Circuit explained that if a court makes a substantive
24 change in its decision, the judgment must be amended under
25 Federal Rule of Civil Procedure 59(e). Id. at 1299.

26 Amending a judgment under Rule 59(e)/9023 after its entry is
27 an extraordinary remedy which should be used sparingly. Allstate
28 Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011). A Rule

1 59(e)/9023 motion may not be used to raise arguments or present
2 evidence for the first time that could have been raised or
3 presented earlier in the litigation. Kona Enter., Inc. v. Estate
4 of Bishop, 229 F.3d 877, 890 (9th Cir. 2000) (citation omitted).
5 Such a motion may only be granted on one of four grounds: (1) if
6 such motion is necessary to correct manifest errors of law or
7 fact upon which the judgment rests; (2) if such motion is
8 necessary to present newly discovered or previously unavailable
9 evidence; (3) if such motion is necessary to prevent manifest
10 injustice; or (4) if the amendment is justified by an intervening
11 change in controlling law. Allstate, 634 F.3d at 1111.

12 Debtors assert the remedy afforded under Rule 59(e)/9023 is
13 appropriate in this case for two reasons: (1) to correct manifest
14 errors of law and fact; and (2) to prevent manifest injustice.
15 Debtors' arguments are without merit. Each of the arguments the
16 debtors now raise in the motion to alter or amend are either new
17 arguments raised for the first time on reconsideration but which
18 could have been raised with the debtors' initial motion to quash,
19 or have already been considered and rejected.

20 The debtors challenge the corporation's standing under Rule
21 2004. The court overrules this objection for the reasons stated
22 in Section I, supra, which are incorporated herein by this
23 reference.

24 The debtors remaining arguments regarding the corporation's
25 use of Rule 2004 for plan revocation purposes and the authority
26 of the corporation's other shareholder could (and should) have
27 been raised with the initial motion to quash. They were not and
28 the debtors offer no explanation for their failure or inability

1 to raise those arguments initially with the motion to quash.

2 The only arguments made in support of the motion to quash
3 were (1) that the corporation could not use Rule 2004 but,
4 rather, had to obtain any discovery under the Federal Rules of
5 Civil Procedure because of pending California Corporation § 2000
6 proceedings; and (2) the corporation had not demonstrated good
7 cause. The court rejected both arguments finding (1) that the
8 discovery sought by the corporation under Rule 2004 was unrelated
9 to the California Corporations Code § 2000 proceedings and
10 therefore the use of Rule 2004 was appropriate, and (2) inasmuch
11 as the corporation invoked Rule 2004 to ascertain if the debtors
12 engaged in any wrongdoing with respect to their duties and
13 obligations under the Bankruptcy Code and under the confirmed
14 third modified plan, the use of Rule 2004 was appropriate and
15 good cause for its use was shown. The debtors said nothing about
16 plan revocation under § 1330 or the corporation's or its
17 principal's authority to invoke Rule 2004. The court will not
18 entertain those arguments now, raised for the first time on
19 reconsideration, when they easily could (and should) have been
20 raised initially with the motion to quash.

21 Therefore, based on all the foregoing and for the reasons
22 previously stated on the record on January 20, 2016, the debtors'
23 motion to alter or amend the court's December 8, 2015, order
24 denying the debtors' motion to quash the corporation's Rule 2004
25 subpoenas, ordering the debtors to produce documents, and
26 ordering the debtors to appear for Rule 2004 examinations is
27 DENIED.

28 A separate order will issue.

1 **III. ORDER DENYING APPLICATION FOR RULE 2004 EXAMINATION AND**
2 **QUASHING RELATED SUBPOENA [Dkts. 228, 237]**

3 On December 9, 2015, the debtors filed an application to
4 examine the corporation and its principal under Rule 2004 with a
5 related subpoena for document production and compelling
6 attendance. The application was set by the court for hearing,
7 and was heard, on January 20, 2016. Appearances were noted on
8 the record. For the reasons explained below, the application
9 will be denied and the related subpoena quashed.

10 As ordered in Section I, this case is converted to a chapter
11 7 case. The debtors' Rule 2004 application states that the
12 purpose of the requested examination and document production is
13 to determine the debtors' and estate's rights to compel
14 distributions from the corporation and any claims the debtors may
15 have against the corporation for wrongful distribution. On pages
16 9-10 of the document filed at docket no. 258, which is the
17 debtors' opposition to this court's order to show cause entered
18 on December 15, 2015, and discussed in Section IV, infra, the
19 debtors suggest that the Rule 2004 examination and document
20 production are also necessary to determine if the debtors can
21 perform under the third modified plan if the corporation
22 dissolves. Since this case is now converted, any cause of action
23 against the corporation, if any, will be brought by the chapter 7
24 trustee. And given conversion, plan performance and
25 implementation are no longer an issue.

26 Therefore, for the foregoing reasons, the debtors'
27 application for an order permitting Rule 2004 examinations of the
28

1 corporation and its principal is DENIED and the related subpoenas
2 are QUASHED.

3 A separate order will issue.
4

5 **IV. ORDER DISCHARGING ORDER TO SHOW CAUSE WITH NO FURTHER**
6 **SANCTIONS [Dkt. 237]**

7 On December 15, 2015, the court entered an order to show
8 cause directing debtors' litigation attorney to show cause why he
9 should not be sanctioned for attempting to use the debtors'
10 December 9, 2015, Rule 2004 application and subpoena to obtain
11 discovery related to a stayed evidentiary hearing on the
12 valuation and transfer of the co-debtor's 50% corporate interest.
13 The court heard this matter on January 20, 2016. Appearances
14 were noted on the record.

15 The court stayed an evidentiary hearing on the valuation and
16 transfer of co-debtor's 50% corporate interest under California
17 Corporations Code § 2000 after the debtors appealed from two
18 orders the court considers interlocutory orders related to that
19 matter. The court stayed the evidentiary hearing in order to
20 allow the district court to decide if it is necessary to construe
21 the debtors' notices of appeal as motions for leave to appeal
22 and, if so, whether it will hear the appeals. The possibility of
23 sanctions was based on what the court perceived as an attempt by
24 the debtors to use the Rule 2004 process and related subpoena
25 discussed in Section III, supra, to circumvent that stay and
26 obtain discovery related to the valuation and transfer
27 proceedings.
28

Since the debtors' Rule 2004 application has now been denied

1 and the related subpoena quashed as ordered in Section III,
2 supra, the order to show cause will be DISCHARGED as moot. No
3 further sanctions are ordered.

4 A separate order will issue.

5 Dated: February 3, 2016.

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8 UNITED STATES BANKRUPTCY JUDGE
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1 **INSTRUCTIONS TO CLERK OF COURT**
2 **SERVICE LIST**

3 The Clerk of Court is instructed to send the attached
4 document, via the BNC, to the following parties:

5 Arthur Samuel Humphrey
6 78 Cernon St #A
7 Vacaville CA 95688

8 W. Scott de Bie
9 P.O. Box 981444
10 West Sacramento CA 95798

11 Thomas R. Phinney
12 400 Capitol Mall, Suite 2560
13 Sacramento CA 95814

14 Jan P. Johnson
15 PO Box 1708
16 Sacramento CA 95812
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